IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ABBREVIATIONS USED IN THIS PETITION

A = Appendix to the petition.
Bd. Ex. = Exhibit attached to Findings, Conclusions and Decision of the Board of Trustees, designated in the Record in Bowling v. Mathews, Appeal No. 75-3879, as Doc.3(H)8, filed in the District Court on April 14, 1976.
Doc. = document, as numbered in Record certified to the Court of Appeals.
PX = Petitioner's (University's) exhibits in Record.
RX = Respondent's (Bowling's) exhibits in Record.
M = Record in Bowling v. Mathews, Appeal No.75-2949.
2M = Record in Bowling v. Mathews, Appeal No.76-3879.
2M Doc.3(G)7 = Transcript of Proceedings Before the Board of Trustees, December 13, 1975, filed in District Court, April 14, 1976.
2M Doc.3(H)8 = Findings, Conclusions and Decision of the Board of Trustees, filed in District Court, April 14, 1976.
S = Record in Bowling v. Scott, Appeal No. 75-1426, in which only the documents were numbered consecutively, as certified on appeal.
1T = Transcript of the First Hearing.
2T = Transcript of the Second Hearing.

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Petitioner Lawrence E. Bowling respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming a summary judgment and other orders of the United States District Court for the Northern District of Alabama, in Bowling v. Mathews and Bowling v. Scott, which were consolidated on appeal.[1]

[1]Respondents are the following individually and officially charged officers of the University of Alabama: David Mathews, President; Richard Thigpen, past Executive Vice President; Paul E. Skidmore, General Counsel; Howard B. Gundy, past Academic Vice President; Floyd H. Mann, Special Assistant to the President; Willard Gray, past Associate Academic Vice President; Douglas E. Jones, Dean, College of Arts and Sciences; James B. McMillan, past Chairman, Department of English; Dwight L. Eddins, past Chairman, Department of English; First Hearing Committee Members Annabel D. Hagood, Robert E. Johnson, John S. Pancake, and C. Dallas Sands; present and past Members of the Board of Trustees George C. Wallace, LeRoy Brown; Daniel T. McCall, Jr.; Winton M. Blount; Eris F. Paul; Yetta G. Samford, Jr.; John T. Oliver, Jr.; John A. Caddell; Ehney A. Camp, Jr.; Samuel Earle G. Hobbs; Thomas S. Lawson; and Ernest G. Williams; and J. Rufus Bealle, Executive Secretary to the Board of Trustees.

OPINIONS BELOW

The opinion of the Court of Appeals dated January 8, 1979, and reported at 587 F. 2d 229, is reprinted at A1. The opinion of the Court of Appeals dated April 14, 1974, and reported at 511 F.2d 112, is reprinted at A6. Orders of the District Court are attached as follows: Order of February 1, 1974, remanding the cause to the University, A8; Orders of June 20, 1974, and January 28, 1975, denying reinstatement and declaratory judgment, A9-12; Order of May 22, 1975, granting final dismissal as to defendant Sands, A13; Order of August 18, 1976, granting summary judgment to the remaining defendants, A14.

JURISDICTION

The first judgment of the Court of Appeals was entered on April 14, 1975. A16. The last judgments of the Court of Appeals were entered on January 8, 1979. A17-18. Time for filing a petition for rehearing en banc was extended to February 21, 1979. A timely petition for rehearing en banc was denied on March 13, 1979. A19. The jurisdiction of this court is invoked under 28 U.S.C. § 1454(1).

QUESTIONS PRESENTED

1. Whether, in an action by a discharged tenured professor suing named state officials for equitable relief and damages for deprivation of rights protected by the Fourteenth Amendment and 42 U.S.C. §§ 1983, 1985, and 1986, including First Amendment rights and voting rights, a District Court may deny plaintiff's right to a plenary trial, including discovery and trial by jury, remand the cause to defendants for a second discharge proceeding, and, on the basis of that hearing record, grant summary judgment for defendants on both the equitable and the legal issues.

2. Whether a tenured teacher, found by the Court to have been discharged without due process, is entitled to reinstatement prior to another discharge proceeding.

3. Whether a termination policy providing for discharge of tenured teachers for undefined and unrestricted "adequate cause" is unconstitutionally vague and overbroad.

4. Whether dismissal charges referring to periods of one to seven years prior to last year of employment and alleging conduct for which there had been no warning deny due process, as held by the Supreme Court of Alabama.

5. Whether defendants charged with conspiracy and deprivation of civil rights may be dismissed prior to answer, discovery, or evidentiary hearing, on a plea of quasi-judicial immunity in non-judicial action.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S Constitution, Article I, §§ 9 and 10;

U.S. Constitution, Amendments I, VII, and XIV;

U.S. Code, Title 42, Sections 1983, 1985(3), and 1986;

University of Alabama, Policy on Termination of Appointment, Faculty Handbook, 1968, p. 38.

The texts are set forth in Appendix L, infra at A20-23.

STATEMENT OF THE CASE

This case arises because certain officers of the University of Alabama (1) solicited a tenured senior full professor, Dr. Lawrence E. Bowling, for a political contribution in a presidential election, (2) discriminated against him in salary increments and course assignments because of his refusal to contribute, (3) discharged him without any charges or opportunity for hearing, because of his complaints concerning the solicitation, discriminations, and conditions of his employment, and (3) after reinstating him following his declaration of intent to file court action, permanently suspended him from all his professional duties, without any prior notice, charges, or opportunity for a hearing, and (4) thereafter discharged him pursuant to a hearing which the District Court found to have denied due process. The original complaint demanded reinstatement, back pay, and compensatory and punitive damages in excess of $10,000 against individually and officially named

defendants charged with violating rights protected by the First, Ninth, and Fourteenth Amendments and by 42 U.S.C. §§ 1983, 1985(3), and 1986. Trial by jury was timely demanded. The District Court's jurisdiction rested on 28 U.S.C. §§ 1331 and 1343.

Specifically, in October, 1964, English Department Chairman James B. McMillan served on petitioner, at his campus post of duty and during working hours, a solicitation for a political contribution to support the "election of President Johnson and Senator Humphrey" in the presidential election. M53 (See abbreviations, p. ii, supra.) Petitioner refused to contribute, and McMillan thereafter began and continued a course of discrimination against him in the assignment of classes and salary increments. In the spring of 1967, petitioner brought these discriminations to the attention of the President and the Vice Presidents and also called attention to the fact that, because of McMillan's ineffective leadership of the department, relatively few students were enrolling in English. M4,156, 177, 193. He requested, but never received, a grievance hearing on these issues. Instead, without any prior notice, charges, or hearing, he was ordered to submit to a psychiatric examination or be discharged. M 178, 195-200. He requested a statement of charges; the request was denied; he refused to submit to the examination and was informed that his employment would be terminated as of July 1, 1967.

Petitioner sought the services of an internationally recognized psychiatrist, who advised him: "What you need is not a psychiatrist but a lawyer. ... Go back to your university and tell those officials ... that you'll see them in court." Petitioner did as advised, and the President immediately reinstated him in his position on August 18, 1967. M180; 2T 1265-1269, 1896-1897, PX 51. But unknown to petitioner, "there were discussions about whether Professor Bowling should have any further salary increases or any more leaves of absence". 2T RX 1-A at 313. Plaintiff received no salary increase for 1967-68, the academic year following this matter, and no salary increase after 1970. M180, ¶ 15X.

In the fall of 1971, petitioner began researching an article on "High Athletics and Low Academics at the University of Alabama". Its point was that, by strict discipline in football, the school had won the rating of Number One; whereas, in academics, the University Administration's general attitude of permissiveness had resulted in low ratings in many regional and national surveys and reports. M5,157. On September 13, 1971, petitioner interviewed University Counsel George Driver concerning these matters. Id. Immediately thereafter, on the same day, Chairman McMillan and Dean Douglas E. Jones began harassing petitioner concerning a report on his leave for the previous academic year. 2T 964[A]-167; PX 19-A, 18-A. Petitioner also brought these matters to the attention of two members of the Board of Trustees, on September 25, 27. M157, ¶17E.

On January 1, 1972, McMillan was replaced as Chairman by Associate Professor Dwight L. Eddins, who, on January 11, "requested" that petitioner teach a section of English 9, an elementary course normally taught by part-time graduate assistants. PX 15. Petitioner stated that teaching this course would violate the terms of his employment but that he would teach it if ordered to do so. 2T 692, Eddins's testimony. On Janu-

ary 12, Law Professor C. Dallas Sands advised Dean Jones concerning discharge proceedings in this case; and on January 13, Jones took a firm stand against petitioner. M38. Also on January 13, Eddins told petitioner to resign and made two threats: (1) if petitioner would not resign, Eddins would always discriminate against him in the assignment of courses and (2) if petitioner should ever reveal this threat, Eddins would swear that petitioner was lying. RX 68. Immediately thereafter, petitioner informed Jones that he would teach the class without any order. RX 70,at 232-233; Jones's testimony. On January 14, petitioner delivered to Jones a letter (M62), confirming this fact. But Jones wrote a letter (PX 14), advising Eddins to assign "this particular section of Eh 9 to another teacher pending further action in this matter", and the class was "re-assigned to a graduate student". 2T 609:6. Both Eddins and Jones testified that petitioner did not "refuse" to teach the class. 2T 691-693, 912:13-15, RX 70,at 201:16-18.

On February 8, 1972, Eddins, with advice of his superiors, permanently suspended petitioner from all his teaching duties, without any prior notice, charges, or opportunity for a hearing. M64, PX 7. No hearing was ever allowed on that suspension. Eddins continued making the threats of discrimination and perjury, and petitioner made a sound recording of them on February 21, 1972, transcribed as RX 68. At the first hearing, Eddins swore that he did not make such threats. Confronted with the sound recording, he admitted that it was true and accurate. RX 66 at 425-428, 456-457.

On February 28, 1972, without any prior notice, charges, or opportunity for hearing, Dean Jones ordered petitioner to resign

or "face charges". Petitioner requested charges and names of witnesses, but Jones refused to supply either. RX 81-A. Petitioner refused to resign.

On March 13 and 16, 1972, petitioner requested that President Mathews supply certain information and release a recent report of the Southern Association, which petitioner needed in connection with the article he was writing on athletics and academics. M201,202. Mathews did not respond. On March 29, 30 and April 3, petitioner discussed these matters with Trustees Williams and Caddell and gave them copies of reports of the American Council on Education and the Association of Research Libraries, and a College and University Environmental Scales survey, all ranking the University low academically. M187. On April 8, the Board of Trustees adopted a Resolution authorizing President Mathews "to handle matters of***dismissal***with regard to faculty and staff members". 2M Doc.3(H)8,p.26. On April 11, Dean Jones filed dismissal charges against petitioner. M259. The charges covered the whole period of petitioner's employment, on none of which he had received any previous complaint. A hearing was held in May and June, and Dean Jones discharged petitioner as of August 13, 1972. Petitioner appealed to President Mathews, who denied the appeal on January 24, 1973. M9.

The action of Bowling v. Mathews was filed on February 9, 1973. On May 31, petitioner amended his complaint as a matter of right (M155-159), specifically charging that certain defendants conspired to, and did, deprive him of equal protection of the laws and that certain other defendants knew of this conspiracy and failed to take any pre-

ventive action. On June 25, he filed a motion for permission to amend his complaint to charge that defendants conspired to, and did, discharge him in retaliation for his petitioning for redress of grievances and for exercise of freedom of speech for the purposes of saving taxpayers' money and improving the University academically. M172. On October 12, petitioner timely demanded trial by jury and filed a motion for permission to amend his complaint to request (1) a declaratory judgment on the issues of the constitutionality of the University's termination policy, the statement of charges, and the findings of the Hearing Committee and (2) a preliminary injunction reinstating him in his position. M308-313. Meanwhile, he had filed numerous requests and motions for discovery (M122, 125, 128, 204, 285, 288) and for preliminary reinstatement in his position. M209, 314. All of these motions were denied. M150, 203, 383, 317, 318, 325, 326, 360.

Following the procedure outlined in the majority opinion in Ferguson v. Thomas (CA5 1970), 430 F.2d 852, the Court denied petitioner's request that defendants be ordered to answer the complaint (M321), read the Committee Hearing transcript, found denial of due process, and, over petitioner's strong objections, remanded the cause to respondents for a second hearing. M382, 387; 2T 1839. Petitioner perfected Appeal No. 74-1309.

While that appeal was pending, petitioner filed motions on April 8, 1974, requesting (1) partial summary judgment, including a declaration of the unconstitutionality of the termination policy, (2) reconsideration of the order remanding the cause to the University, and (3) a preliminary injunction for back pay and full reinstatement

pending further proceedings. M419-425. The Court granted back pay and continuation of salary and denied the motions in all other respects. A10

On July 23, 1974, Dean Jones filed his Second Statement of Charges (M512-535), which, like his original charges, consisted almost wholly of charges relating to periods from one to seven years prior to the last year of petitioner's employment and to petitioner's private statements to his employer and his colleagues concerning the terms and conditions of his employment.

On January 27, 1975, petitioner filed the action of Bowling v. Scott, charging additional violations of rights protected by the First and Fourteenth Amendments and by 42 U.S.C. §§ 1983, 1985(3), and 1986 and demanding (1) a declaratory judgment on the constitutionality of the termination policy and the Second Statement of Charges and (2) an injunction reinstating petitioner in his position. S Doc. 2. The District Court's jurisdiction rested on 28 U.S.C. §§ 1331, 1343, and 2201. On January 28, 1975, he amended his complaint to add demands for damages against the individually and officially named defendants, trial by jury, and determination of the legal claims prior to determination of the equitable claims. S Doc. 4. The Court entered Orders denying all requested relief (A11-12), and petitioner perfected Appeal No. 75-1426.

On April 17, 1975, the Court of Appeals affirmed the District Court's rulings from which petitioner had appeald in Bowling v. Mathews, basing its affirmance upon Ferguson v. Thomas, supra. A6.

The second hearing did not begin until

May 1, 1975, fifteen months after it had been ordered. A4,A8. Petitioner filed motions to strike designated averments in the charges, on the grounds that they were unconstitutional because of vagueness, overbreadth, res judicata, staleness, condonation, and waiver. M536-560. These motions were denied, and petitioner moved the District Court to restrain respondents from proceeding with the second hearing until the Court could render a declaratory judgment on the constitutionality of the termination policy and the Second Statement of Charges. M509-560. The Court denied the motion. M569.

On May 22, 1975, the District Court entered a final judgment of dismissal as to defendant C. Dallas Sands (M570), and petitioner perfected Appeal No. 75-2949.

On July 21, 1975, the Hearing Committee "concurred" in the void prior discharge. 2M Doc.3(H)8, Ex.F, p.II. On October 7, 1975, Dr. Howard B. Gundy, acting for the University despite his previous disqualification of himself for bias as a defendant in the legal action (Id.Ex.U), "concurred" in the Committee's "concurrence". On April 3, 1976, the Trustees, who were also defendants for damages, "approved" the "concurrence" of the Hearing Committee. 2M Doc.3(H)8.

The District Court denied petitioner's requests for a plenary trial, including trial by jury, reviewed the Second Hearing record, and, without opinion, entered summary judgment for respondents on both the equitable and the legal issues, on the basis of the hearing record on the equitable issues. A14. Petitioner perfected Appeal No. 75-3879, and the Court of Appeals affirmed, on the basis of Ferguson v. Thomas, supra. A1.

REASONS FOR GRANTING THE WRIT

I. Unconstitutional Fifth Circuit Rule

The United States Court of Appeals for the Fifth Circuit has fashioned a rule of constitutional law which denies to teachers and all other school personnel the right to a federal forum and trial by jury, and limits the District Court to a review of the administrative record, on all civil rights claims arising under the Fourteenth Amendment and 42 U.S.C. §§ 1983, 1985, and 1986. This rule departs so far from the prescribed course of judicial procedure as to call for an exercise of this court's power of supervision.

Sections 1983, 1985, and 1986 expressly provide for a plenary trial in "an action at law" and/or "suit in equity", and 28 U.S.C. §§ 1331 and 1343 provide that "[t]he district courts shall have original [not appellate] jurisdiction of any civil action commenced by any person" under these acts and the Fourteenth Amendment. This court has "long held that an action under § 1983 is free from [the exhaustion] requirement." Ellis v. Dyson (1975), 421 U.S. 426, 432; Monroe v. Pape (1961), 365 U.S. 167; McNeese v. Board of Education (1963), 373 U.S. 668, Damico v. California (1967), 389 U.S. 416; King v. Smith (1968), 392 U.S. 309; 312; Houghton v. Shafer (1968), 392 U.S. 639; Wilwording v. Swenson (1971), 404 U.S. 249; Gibson v. Berryhill (1973), 411 U.S. 564; Steffel v. Thompson (1974), 416 U.S. 249.

This court has also consistently held that "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to

jury trial." Lorillard v. Pons (1978), 98 S.Ct. 866, 871; Curtis v. Loether (1974), 415 U.S. 189; Pernell v. Southall Realty (1974), 416 U.S. 363. The Court has further held that in an action involving both legal and equitable claims, a litigant is entitled to jury determination of the legal issues and all facts common to both the legal and the equitable issues, prior to determination of the equitable issues. Beacon Theatres v. Westover (1959), 359 U.S. 469; Dairy Queen v. Wood (1962), 369 U.S. 469.

In Mitchum v. Foster (1972), 407 U.S. 225, 242, the Court emphasized: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's rights---to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" In Preiser v. Rodriguez (1973), 411 U.S. 475, 496, the Court held that "the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure."

Despite these facts, the Fifth Circuit has fashioned, and continues to enforce, a procedure which runs directly counter to this court's rulings and the Civil Rights Acts, in two most fundamental respects. First, it requires exhaustion of state administrative remedies; second, it restricts the District Courts to a review of the administrative hearing record. It thus repeals the Civil Rights Acts and reinterposes state officials between public employees and the federal courts.

The Fifth Circuit took the first step in the formulation of this procedure in Stevenson v. Board of Education (CA5 1970), 426 F.2d 1154, "a civil rights case brought under 42 U.S.C.A. §§ 1981 and 1983 and 28 U.S.C.A. § 1343(3), by three male Negro high school students who were suspended from school for refusing to shave." Id. at 1156. Although the panel expressed awareness of this court's rulings in Monroe, Damico, Houghton, and King, supra, it held these cases inapplicable "in school personnel and management problems." Id. at 1157.

In Ferguson v. Thomas, supra, the Fifth Circuit applied its exhaustion-and-limited-review procedure to teacher discharge cases. A divided panel held that the District Court had erred in allowing a plenary trial and advised that such procedure not be permitted in similar future cases:

> Federal Court hearings in cases of this type should be limited in the first instance to the question of whether or not federal rights have been violated in the procedures followed by the academic agency in processing the plaintiff's grievance. If a procedural deficit appears, the matter should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. ... If the procedures followed were correct and substantial evidence appears to support the Board's action, that ordinarily ends the matter. [Id. at 858; emphasis added]

In the recent case of Viverette v. Lurleen B. Wallace Jr. College (CA5 1979), 587 F.2d 191, 193, the Fifth Circuit further extended the Ferguson procedure to

apply to all civil rights actions involving "employees" of "educational institutions" and summarized the procedure as follows:

> In reviewing the decision of an educational institution to discharge one of its employees, a federal court is limited to a two-tier level of inquiry: whether the procedures followed by the school authorities comported with due process requirements, and, if so, whether the action taken is supported by substantial evidence. Ferguson v. Thomas, 430 F.2d 852, 858 (5th Cir. 1970); Fluker v. Alabama State Board of Education, 441 F.2d 201, 208 n.15 (5th Cir.1971); Thompson v. Madison County Board of Education, 476 F.2d 676, 680 (5th Cir.1973)(Clark,J., concurring); Stapp v. Avoyelles Parish School Board, 545 F.2d 527, 534 (5th Cir.1977). Because federal courts are limited in the scope of their review to the procedures employed by and the evidence before an educational review board, it was not improper for the district court to grant summary judgment on the basis of the transcript of the hearing by the Ad Hoc Committee and the exhibits attached thereto; in fact, de novo hearings in district courts on such matters are not favored. [Emphasis added]

This summary implies that the Ferguson procedure has been universally approved and adopted by all "federal courts", whereas neither this court nor any Court of Appeals other than the Fifth Circuit has ever adopted this procedure.

By limiting the District Courts to a review based on substantial evidence, the Ferguson procedure shifts the burden of

proof from the school officials to the teacher and also requires that he prove, by at least a preponderance of the evidence, that he should not have been discharged, whereas due process mandates that the burden is on the moving parties to prove, by at least a preponderance of the evidence, that the teacher should be discharged. The Ferguson procedure completely reverses and inverts the most basic principle of all law: the presumption that every person charged with an offense must be presumed innocent until proven guilty. Speiser v. Randall (1958), 357 U.S. 513, 525; Armstrong v. Manzo (1965), 380 U.S. 545, 551-552.

The Ferguson procedure stands the Civil Rights Acts on their head. Moreover, it emasculates the Fourteenth Amendment and repeals the Seventh; for it denies the right to trial by jury, including the right to jury determination of the legal issues and of all facts common to the legal and the equitable issues, prior to determination of the equitable issues.

The Fifth Circuit has twice held that petitioner must not only exhaust administrative remedies but that he must exhaust them twice. Although the Record shows that petitioner had fully exhausted administrative remedies and had been finally discharged, before filing this action (A2), the District Court denied petitioner's right to trail on this issue in a federal forum and remanded the cause to the University for a second discharge proceeding, and the Fifth Circuit twice approved this procedure. A5, A7. The first appeal panel justified its approval of the remand on the basis of its (erroneous) finding that "the second administrative hearing of which Bowling now complains was

accorded by the trial court at his own behest". A7. The Record in Bowling v. Mathews shows that petitioner at no time requested a second hearing and that he repeatedly objected to such hearing. M423; 2T1839. He filed the action of Bowling v. Scott to forestall that hearing, S Doc. 2.

This court has held: "A court's jurisdiction may be lost 'in the course of the proceedings' due to failure to complete the court---as the Sixth Amendment requires---by providing counsel for an accused who is unable to obtain counsel .... If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed." Johnson v. Zerbst (1938), 304 U.S. 458, 467-468.) Citing Johnson, the Fifth Circuit has held that a court loses jurisdiction if it fails to complete the court by granting properly demanded jury trial: "We believe that a judgment ... reached without due process of law is without jurisdiction and void ... because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. The right of jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly [as deprivation of counsel was in Johnson] an unconstitutional abuse of power." Bass v. Hoagland (CA5 1949), 172 F.2d 205, 209. This court denied certiorari. 338 U.S. 816.

In the instant case, the Fifth Circuit panel re-affirmed the Ferguson procedure as "the well-established authority of this Circuit" and held that it forecloses the right to jury trial: "We reject, as

inconsistent with the well-established authority of this Circuit, appellant's contention that minimum procedural due process entitles him to a jury trial on the merits of his termination. See, e.g., Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970)." A5, n.7. The panel found that the proceedings in the District Court and by the University "fully complied with the procedural due process standards of the Fourteenth Amendment." A5.

That this finding is clearly erroneous in numerous respects, in addition to denial of trial by jury, is obvious on its face. In footnote 5, that opinion quotes from Dr. Scott's memorandum to the Second Hearing Committee the instruction that "the burden of proof ... shall be satisfied only by clear and convincing evidence". Yet, on the same page, the opinion states that the Committee based its findings upon "substantial evidence". A4.

That opinion further staces that petitioner was "represented throughout these proceedings by a Professor at the University of Alabama Law School." A4. Both the hearing transcript and an affidavit of that professor reveal that some of the hearing sessions were scheduled at times that Professor Holt could not be present, 2T 761, contrary to Dr. Scott's written instruction that the Committee must schedule the times of its meetings "with due consideration for the convenience of ... Dr. Bowling and his counsel" (2M Doc.3(H) 8, Board Ex. D); that, on one occasion when Professor Holt could not be present, the Committee held a meeting, over his and petitioner's protests, heard testimony

from an unscheduled witness whom the committee had been informed that only Professor Holt was prepared to question, and denied petitioner's request for permission to make a telephone call to Professor Holt for his counsel. 2T 761, 1861-1837, 1950, 2010-2015; Professor Holt's affidavit, 2M Doc. 3(H)8, Bd. Ex.T.

The panel opinion fails to note innumerable other violations of due process in the second discharge proceedings, including the following. There was a fifteen-month delay between the date of the rehearing order of February 1, 1974, (A8) and the beginning of that hearing, May 1, 1975. A4. That delay denied due process in two important respects. First, the longer petitioner was deprived of his association with students and colleagues, the more firmly established became the view that he was a "discharged professor", thereby prejudicing potential members of the second hearing committee. Second, the delay allowed witnesses to disappear and memories to grow dim concerning the facts surrounding and preceding the suspension and discharge. Morrissey v. Brewer (1972), 408 U.S. 471. Indeed, on October 9, 1973, respondents alleged that they were unable to answer the complaintbecause "this case has been talked around" so much that respondents were unable to distinguish between what they had done and what they had heard. M469. Of the seven witnesses testifying against petitioner, six repeatedly contradicted their own testimony and exhibits and alleged unclear memories as reason for their self-contradictions and their failure to remember facts favorable to petitioner, in innumerable instances.

The Committee held an ex parte conference with University Counsel Skidmore and

accepted his advice that it employ as its counsel a relative of President Mathews. 2T 29-21, 32-33. Executive Vice President Thigpen, Academic Vice President Gundy, Assistant Academic Vice President Scott, and the Trustees refused to appear and testify before the Committee, and Thigpen told secretaries not to testify. 2T 761-762, 831, 1524-1544, 1557-1560, 1726-1728, 1836, 1838-1839. The Committee based its findings upon nine ex post facto "duties of a full professor", which it formulated and applied against petitioner after the hearings were closed. 2M Doc. 3(H)8. Bd. Ex. F, p. 1.

University Counsel Skidmore misled the Committee into misconceiving its proper function to be merely that of endorsing and concurring in the prior void discharge, rather than that of making an original, independent determination whether petitioner should be discharged. In the last sentence of his closing argument, Skidmore urged the Committee: "We respectfully ask that you render a recommendation endorsing the termination of the employment of Dr. Bowling." 2T 2275. That the Committee conceived its function in precisely this light is made clear by the final sentence of its Report: "The Committee recommends, then, since it concurs that Charge One and Charge Two have been proved by the petitioner, that respondent, Professor Lawrence E. Bowling, be dismissed from his position as a tenured professor in the Department of English, College of Arts and Sciences, The University of Alabama."

Dr. Howard Gundy, "the University official assigned the responsibility of making the final institutional decision with respect to [petitioner's] future employment"

(A5) was a defendant in the legal action for damages and had previously disqualified himself because of personal bias (Bd. Ex. U), and President Mathews had concurred in this disqualification. Bd. Ex. V. Moreover, the individual members of "the Board of Trustees of the University of Alabama, which approved the recommendation of the faculty hearing committee" (A5), were also defendants in the legal action for damages, had a vested interest in the outcome, and were not apparently impartial decision-makers. Gibson v. Berryhill, supra.

The Trustees denied due process in numerous respects, including making independent "initial" findings, contrary to their ruling that they would only "review [the Committee's] initial determination" (2M Doc.3(G)7, pp.9-10); making findings contrary to the evidence; adopting and applying against petitioner seven ex post facto "duties of a Professor of English" (2M Doc.3(H)8,p. 13) never applied against any other teacher; and denying petitioner's right to salary for "at least one academic year" after notice of termination of his employment, as provided by the termination policy. A23. The Trustees made their decision on April 3, 1976, to terminate petitioner's employment, "effective at the conclusion of the current academic year (May 16, 1976)." Id. at p. 46.

II. Conflict With Decisions Of This Court

Review is further warranted because the rulings of the District Court and the Court of Appeals conflict with decisions of this court on the following important issues:

A. First Amendment rights. The First Amendment protects the right to "freedom of speech" and the "right ... to petition the Government for redress of grievances". This court has recently held that a teacher may not be discharged for speaking privately to an employer concerning "policies and practices of the school district". Givhan v. Western Line Consolidated School District (1979), 99 S.Ct. 693. This court has long held that "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools", Shelton v. Tucker (1960), 364 U.S. 479, 487; that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protection should apply with less force on college campuses than in the community at large", Healy v. James (1972), 408 U.S. 169; and that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech", Papish v. Board of Curators of the University of Missouri (1973), 410 U.S. 667, 671.

Almost the whole of the averments in the Statement of Charges (M512-535) and of the Findings of the Board of Trustees (2M Doc.3(H)8, pp.11-21) related to petitioner's private speech to his employer and to his colleagues concerning the terms of his employment and "policies and practices" of his university. See Memorandum of Official Observers of the American Association of University Professors and the American Federation of Teachers, 2M Doc.3(H)8, Bd. Ex. P. Even petitioner's alleged "refusal" to teach a section of English 9 on January 11, 1972 (M522) (which Dean Jones testified was the reason

for initiating the discharge proceedings, 2T 697:14-18; RX 70, p.247:12-15) related to the terms of his employment. Both Dean Jones and English Chairman Eddins admitted that petitioner did not "refuse" to teach the class but only "objected" that teaching it would not comply with the terms of his employment; that petitioner explicitly stated that he "was not refusing to teach the course" and that he would teach it if ordered to do so; that no order was given; that he then agreed to teach it without an order; and that it was "re-assigned to a graduate student". 2T 609, 691-693, 912, 916; PX 15; RX 70, pp. 201, 232-233.

Contrary to the foregoing testimony by Jones and Eddins, the Board found that on "January 11-12, 1972, Bowling refused ... to teach a section of English 9". 2M Doc. 3(H)8 p.14. The Board also found: "Within the academic community a Departmental Chairman's request of a member of the Department to teach a course therein is the equivalent of an order to do so" (Id. at 13), despite the fact that Jones admitted that he "didn't tell [petitioner] at the time that the request which had been made to him was tantamount to an order, equaled an order, was an order". 2T 916. The Board thus held that the word "request" has an entirely different meaning "within the academic community" than it has "in the community at large", contrary to this court's holdings in Papish, Healy, and Shelton, supra.

The termination policy (A22) provides that "the appointment of a faculty member who has tenure ... may be terminated for adequate cause." The University has never defined or restricted this term, despite

the fact that both the Association of American Colleges and the American Association of University Professors have repeatedly warned of its vagueness and overbreadth. AAUP Policy Documents and Reports, 1969 ff., p.5. See S Doc.2, p.3.

Although both lower courts impliedly held this termination policy to be constitutional, neither court analyzed that policy or cited any law supporting that conclusion. This court has consistently held unconstitutional innumerable terms far less vague and broad than "adequate cause", including "generally accepted standards of conduct" and "indecent conduct or speech", Papish, supra; "aid", "support", "counsel", "influence", Cramp v. Board of Public Instruction (1961), 368 U.S. 589, "unduly complain", "magnify grievances", "defamatory", Procunier v. Martinez (1974), 416 U.S. 396. In Procunier, the Court held: "These regulations fairly invited prison officials to apply their own personal prejudices and opinions as standards for prisoner mail censorship .... Appellants have failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression." Id. at 415. In Grayned v. City of Rockford (1972), 408 U.S. 104, 108-109, the Court held that vague regulations violate due process in three essential respects: "Vague laws may trap the innocent by not providing fair warning..... A vague law impermissibly delegates basic policy matters to [hearing committees and school boards] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, ... a vague statute ... operates to inhibit the exercise of ... basic First

Amendment freedoms."

These observations are well illustrated in the present case. The broad and vague term "adequate cause" gave no "fair warning" of what was prohibited, "invited" both the Second Hearing Committee and the Board "to apply their own personal prejudices and opinions as standards" for determining the "duties" of a professor, and was used by respondents "to inhibit the exercise of basic First Amendment freedoms." Both the Committee and the Board applied against petitioner their separate sets of ex post facto duties never applied against any other teacher. Respondents have applied "adequate cause" to punish First Amendment expression without achieving a valid governmental interest by the "least drastic means." Shelton v. Tucker, supra.

B. Right to restoration to one's former status when deprivation has denied due process. This court has consistently held that any person deprived of a significant consitutional right without due process of law is entitled to full restoration to his original status prior to any further proceedings against him. Service v. Dulles (1957), 354 U.S. 363; Vitarelli v. Seaton (1959), 359 U.S. 535; Armstrong v. Manzo, supra. In Vitarelli, "petitioner filed suit in the United States District Court seeking a declaration that his dismissal had been illegal and ineffective and an injunction requiring his reinstatement". This court found that "petitioner's procedural rights were violated in at least three material respects in the proceedings which terminated in the final notice of his dismissal", "that such dismissal was illegal and of no effect", and "that

petitioner is entitled to the reinstatement which he seeks". Id. 537, 541, 545, 546.

In Armstrong v. Manzo, Armstrong's former wife and her successor husband brought suit to adopt the daughter of Armstrong and Mrs. Manzo, without giving notice to Armstrong. The Texas district court held a hearing and rendered a decree in favor of the Manzos. Informed of this fact, Armstrong moved the court to set aside the decree. Instead, the court held a hearing on the motion, which was denied. The Texas Court of Civil Appeals affirmed, and the Supreme Court of Texas refused an application for writ of error. On certiorari, this court unanimously reversed, holding that the granting of the original decree without notice had not only denied due process in that hearing but also shifted the burden of proof to Armstrong and prejudiced him in all subsequent stages of his case.

As a tenured senior full professor, petitioner was permanently suspended from all his teaching duties in the middle of the semester, without any notice, charges, or opportunity for hearing on the suspension. Following a dismissal hearing, to which he had objected, he was discharged. He filed action for reinstatement, back pay, and damages for the unconstitutional suspension and discharge. The District Court refused to rule on the constitutionality of the suspension, despite the fact that it had no discretion not to do so; for this court has held that "legal discretion ... does not extend to a refusal to apply well-settled principles of law to a conceded state of facts". Union Tool Co. v. Wilson (1922), 259 U.S. 107, 112. But the Court did find that the

discharge proceeding contained at least "three fatal defects", any one of which was "sufficient to sustain the lack of due process". M386. Having made this determination, the District Court had no discretion not to declare the suspension and the discharge a nullity and to reinstate petitioner in his former status. Service, Vitarelli, Armstrong, Union Tool, supra.

Instead, the Court ordered only continuation of compensation and remanded the cause to the defendants for a second discharge proceeding, over petitioner's objections. M388, 423; S Doc.2; A8, 9, 11. Thus, the Court's rulings not only allowed the suspension to continue but also gave tacit approval of that suspension, thereby shifting the burden of proof to petitioner and prejudicing him before the Second Hearing Committee and all successive bodies ruling on his case.

Procedurally, this case is almost identical with Armstrong. Respondents' suspension of petitioner without notice, charges, or hearing, was equivalent to the Texas court's rendering the original decree against Armstrong without prior notice. The Court's denial of petitioner's motions to set aside the suspension and reinstate him in his position was identical to the Texas court's denial of Armstrong's motion to set aside its original decree and restore him to his original status. And petitioner was prejudiced before the Second Hearing Committee, the Board of Trustees, the District Court, and the Court of Appeals, as Armstrong was prejudiced in his subsequent proceedings in the Texas courts. The words of this court's opinion in Armstrong are

applicable, with even greater emphasis, in the present case. See 380 U.S. at 551-552.

C. Right to federal declaratory judgment on the issue of the constitutionality of the termination policy and the second statement of charges. In Ellis v. Dyson, supra, this court held that, in a civil rights action under § 1983, "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount." 421 U.S. at 432.

In Bowling v. Mathews (M 311, 421), petitioner repeatedly requested declaratory judgment on the issue of the constitutionality of the termination policy (A22) under which he had been discharged. The Court refused to consider these requests. M325; A9. In Bowling v. Scott, the complaint (S Doc.2) demanded a declaratory judgement on the issue of the constitutionality of both the termination policy and the Second Statement of Charges, under which respondents were again seeking his discharge. Again, the Court refused to rule on this issue. All.

D. Right to damages for unconstitutional deprivation. This court has held that any unconstitutional deprivation of rights, privileges or immunities is actionable in the Federal courts for damages under §§ 1983, 1985, and 1986. Monroe v. Pape, supra; Wood v. Strickland (1975), 420 U.S. 308; Carey v. Piphus (1978), 98 S.Ct. 1042. In Carey, the Court held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury. Id. at 1054.

Petitioner was permanently deprived of all his teaching duties on February 8, 1972, in the middle of the semester and without any notice, charges, or opportunity for hearing on that deprivation, either before or after the deprivation. P.7 supra. Respondents have never disputed these facts. In his complaint, petitioner also charged and the District Court found (M386, A8), that respondents had discharged him without due process of law, and respondents have never challenged the Court's ruling. Despite these undisputed facts and this ruling, however, the District Court denied petitioner's right to nominal damages and his right to trial on the issues of compensatory and punitive damages and entered summary judgment for respondents on all issues (A14), and the Court of Appeals affirmed and taxed costs against petitioner. A1, 16. Even nominal damages, which the courts had no discretion to deny, would have entitled petitioner to his costs and attorney fees.

E. Right to answer, discovery, and exploration of facts before dismissal of defendants charged with conspiracy. The complaint and the amended complaint in Bowling v. Mathews (M 1-88, 155-159) charged that defendants conspired to, and did, deprive petitioner of rights protected by the Constitution and laws of the United States. As to respondent Sands, petitioner averred that Sands was a long-time personal friend of English Chairman McMillan and supported him in the 1964 political solicitation which gave rise to this action; that, on January 12, 1972, Sands advised Dean Jones in the matter of discharge proceedings in the present case; that, thereafter, Sands accepted an

appointment to serve on the First Hearing Committee, despite the fact that the AAUP guidelines adopted by that committee provided that such committee should be composed of faculty members "not previously connected with the case". M 37-38. These are fact issues, which this court has held may not be determined on a motion to dismiss. Scheur v. Rhodes (1974), 416 U.S. 232, 250.

Contrary to this ruling and to F.R.C.P. 56, the District Court dismissed a number of respondents (M 215, 375) and later entered a final judgment of dismissal as to Sands (A13), before answer, discovery, or exploration of facts.

III. Conflict With Other Circuits

Review by this court is warranted also because the Fifth Circuit's decision conflicts with decisions of other circuits.

The Sixth Circuit in Clemons v. Board of Education of Hillsboro (CA6 1956), 228 F.2d 853, 856-858, reversed a District Court's denial of injunctive relief and stated: "While the granting of an injunction is within the judicial discretion of the District Judge, extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights. ... Such abuse of discretion requires reversal."

The Fourth Circuit in Henry v. Greenville Airport Commission (CA4 1960), 284 F.2d 631, 633, held: "The District Court has no discretion to deny relief by preliminary injunction to a person clearly establishing by undisputed evidence that he is

being denied a constitutional right."

The Seventh Circuit in White v. Roughton (CA7 1976), 530 F.2d 750, reversed the District Court and ordered immediate reinstatement of welfare payments because the "unwritten personal standards" applied by defendants violated due process.

The Ninth Circuit in Stewart v. Pearce (CA9 1973), 484 F.2d 1031, 1033, affirmed the District Court's holding that suspension of a teacher without any hearing denied due process and that a "preliminary injunction requiring Stewart's immediate reinstatement to his teaching duties" was appropriate.

After finding denial of due process, the District Court denied petitioner's motions for "reinstatement to his teaching duties" and "continue[d] the deprivation of basic human rights" during the second discharge proceeding. A10.

IV. Conflict With Alabama Supreme Court

Review by this court is warranted also because the Fifth Circuit has decided an important question of an Alabama teacher's rights of due process in a way conflicting with the Alabama Supreme Court's ruling on the same issue.

In State Tenure Commission v. Madison County Board of Education (1968), 213 So. 2d 823, the Alabama Supreme Court held that the statement of charges was "glaringly defective and not due process" because "after these dates complained of, the teacher was an approved teacher in the school and served subsequent terms. Such alleged violations, even if proven, were condoned and waived for all periods

other than the last school year served by the teacher before the written complaint against him." Id. at 829. Compare dissenting opinion of First Hearing Committee Member Edward M. Smith. M 77.

In the present case, almost all the specifications on which both the Committee and the Board based their findings related to periods ranging from one to seven years prior to "the last school year served by the teacher before the written complaint against him". M 512-535. The Board's and the courts' approval of such charges deprives petitioner not only of due process of law but also of equal protection of the laws, as applied to Alabama teachers by Alabama's highest court.

CONCLUSION

Because the Fifth Circuit's Ferguson rule denies to a large and crucial segment of the American population those basic constitutional rights of First Amendment expression, trial by jury, and plenary trial in a federal forum on constitutional issues and because the lower court rulings denied due process in other fundamental respects, this petition should be granted and those rulings should be reviewed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1426, 75-2949 and 76-3879

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

CHARLEY SCOTT et al.,
Defendants-Appellees.

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

DAVID MATHEWS et al.,
Defendants-Appellees.

January 8, 1979.

Before JONES, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

At the heart of this consolidated appeal[1] lies appellant's principal claim[2] that his

[1]These three numbered appeals, consolidated for consideration on appeal, arise out of two actions filed in the district court, both of which involve virtually the same defendants and, in all material respects, the same action.

[2]Although the appellant's due process attack on his termination procedure constitutes the basic thrust of his argument on appeal, we take notice of some twenty-three contentions raised by appelland in his original briefs filed on appeal, many

discharge as a tenured English Professor at the University of Alabama violated the due process guarantees of the Fourteenth Amendment. Because we hold that appellant's termination comported with both procedural and substantive due process, we affirm the various judgments and orders of the district court appealed from.

Appellant Bowling's troubles began with the filing of formal dismissal charges against him in April of 1972. Following a two-week hearing by a faculty committee on these charges in June of that year, appellant's employment was terminated, effective on August 13, 1973, in accordance with the recommendation of the committee.

On February 9, 1973, appellant filed the first of the two actions involved in this appeal, alleging that his termination was unconstitutional and asking for damages and injunctive relief in the form of reinstatement. The district court found the faculty committee hearing to have been deficient in procedural due process, and remanded the cause to the University for a rehearing

of which do not relate to his due process argument. We choose only to discuss appellant's due process argument, but we have dutifully examined his other contentions and find them to be without merit. A few of these undiscussed contentions were resolved adversely to appellant by a prior appeal in this case, Bowling v. Mathews, 511 F.2d 112 (5th Cir.1975).

[3]The second action involved in this appeal, Bowling v. Scott, No. 75-1426, filed by appellant on January 27,1975, named virtually the same defendants and contained essentially the same allegations as did the complaint in the first-filed action. Appeal is taken from various orders entered by the district judge in the second action and, as noted in fn. 2, we affirm the orders appealed from without discussion.

that afforded appellant due process. That order, among others, was affirmed by this Court in Bowling v. Mathews, 511 F.2d 112 (5th Cir. 1975).

Following remand, the university served appellant with a new Statement of Charges, consisting of twenty-four legal-sized pages, which contained dual allegations that appellant failed to perform his assigned duties and committed acts inimical to the efficient functioning of the Department of English. This document specified, in painstaking detail, the factual basis for each charge, the names of those witnesses expected to testify in support of the charges, and the nature of their expected testimony.

Appellant and his counsel next participated in a series of meetings called for the purpose of selecting a faculty hearing committee. The committee was chosen from a master list consisting exclusively of full professors with tenure, but excluding, on a categorical basis,[4] those professors with a potential bias toward appellant's cause. Each party was allowed an unlimited number of challenges for cause and two peremptory challenges.

Following the selection of the committee, Dr. Scott, the administrative official of the college designated to preside over the selection and organization of the committee,

[4]Excluded from the list were all faculty members employed in the College of Arts and Sciences; any administrator or area or department chairman; all professors on leave from the University during the spring semester of 1975; and those members of the faculty hearing committee which considered the first Statement of Charges against appellant.

issued a memorandum of instructions to the committee in which he outlined various procedural guidelines which were to be followed.[5] Subsequent to Dr. Scott's instructions, the committee adopted supplemental procedural rules to govern the conduct of the hearing; these rules were provided to all parties with an opportunity to object within five days thereafter.

Beginning on May 1, 1975, fourteen hearing sessions were held by the committee, with appellant being represented throughout these proceedings by a Professor at the University of Alabama Law School. During the course of the hearings, some twelve witnesses were examined and cross-examined; the University introduced into evidence seventy-nine exhibits and appellant introduced eighty-four exhibits.

Following the conclusion of the faculty committee hearing, the committee issued a twelve-page report finding the charges against appellant to be supported by substantial evidence and recommending that he

[5] Among the instructions contained in Dr. Scott's memorandum were those which: (1) permitted the University and plaintiff to have an academic advisor or counsel; (2) provided for a national AAUP observer; (3) provided for the stenographic reporting of the proceedings with copies of the transcript to be made available to both parties; (4) provided that "the burden of proof that adequate evidence exists in support of the separate charges contained in the statement of charges rests upon [the University] and shall be satisfied only by clear and convincing evidence introduced during the hearing before the faculty hearing committee"; (5) provided for broad latitude in the introduction of evidence but excluded "hearsay" evidence; and (6) required that the committee make explicit findings.

be dismissed from his position as a tenured professor. After considering the committee's report and appellant's memorandum in opposition thereto, Dr. Howard Gundy, the University official assigned the responsibility of making the final institutional decision with respect to appellant's future employment, accepted the recommendation of the committee and informed appellant by letter dated October 7, 1975, that his employment would be terminated, effective August 15, 1976. Appellant subsequently appealed to the Board of Trustees of the University of Alabama, which approved the recommendation of the faculty hearing committee.[6]

The district court, in granting defendants' motion for summary judgment, concluded that the above proceedings fully complied with the procedural and substantial due process standards of the Fourteenth Amendment. We agree.[7] The University officials in this case have meticulously adhered to the procedural safeguards outlined in our prior opinions; moreover, our independent review of the record before the committee convinces us that the action taken was supported by substantial evidence. See Ferguson v. Thomas, 430 F.2d 852 (5th

[6]The Board of Trustees issued a forty-six page report upholding the decision of the University officials. In reaching this conclusion, the Board carefully considered, in addition to the committee's report, the entire record before the committee, as well as the briefs submitted to the Board by appellant. Moreover, appellant was allowed to present, with the assistance of counsel, an oral argument before the Board members.

[7]We reject, as inconsistent with the well-established authority of this Circuit, appellant's contention that minimum procedural due process entitles him to a jury trial on the merits of his termination. See, e.g., Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Cir. 1970); Green v. Board of Regents of Texas Tech University, 474 F.2d 594 (5th Cir. 1973); Stapp v. Avoyelles Parish School Board, 545 F.2d 527 (5th Cir. 1977); Viverette v. Lurleen B. Wallace State Junior College, 587 F.2d 191 (5th Cir. 1979).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1309

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

DAVID MATHEWS et al.,
Defendants-Appellees.

April 14, 1975.

Before BELL, THORNBERRY and GEE, Circuit Judges.

PER CURIAM:

Appellant Bowling, a tenured professor of English at the University of Alabama appearing pro se, has brought various suits grounded on his attempted discharge. on the merits, he claims in general that his termination was for attempted exercise of rights of free speech, and further, was wanting in procedural due process. Our task is complicated by Dr. Bowling's practice of attempting a separate and immediate appeal from many, if not most, of the adverse rulings of the trial court as they occur.

At present, Bowling is being paid his salary by order of the trial court during the process of remand and rehearing by the University (because of procedural deficiencies thought by the court to have obtained in the earlier hearing) pursuant to the procedures outlined in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). This appeal seeks to place the merits of his situation before us, as well as a complaint of the Ferguson procedure. The merits are not properly before us, and we decline to consider them at this juncture. Further, observing that the second administrative hearing of which Bowling now complains was accorded by the trial court at his own behest, we do not find the court's decision to order the university to rehear the case in error.[1] Ferguson, supra. There will be time for the merits when they are drawn before us after this hearing, as doubtless they will be.

Appellant Bowling further complains of the dismissal of certain defendants. Many remain, however, and the court's action in dismissing some but not all defendants in this multi-party action is not appealable in the absence of an FRCP Rule 54(b) "express determination," absent here.

His complaints of the injunction, under which he has continued to receive his salary to date, reveal no abuse of discretion by the court below. He likewise appeals from the refusal of the district judge to disqualify himself. An examination of his affidavit of disqualification establishes that its asserted grounds are limited to actions of the judge in the case at bar.

[1]No questions being raised about the specific details of the court's order as opposed to the fact of it, we have no occasion to consider or decide them.

These will not suffice. United States v. Roca-Alvarez, 451 F.2d 843, 848 (5th Cir. 1971), rehearing granted, 474 F.2d 1274 (1973). His remaining complaints relate to interlocutory matters not meeting any of the tests of 28 U.S.C. § 1292.

Affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
Plaintiff,
- v -) CIVIL ACTION NO.73-M-138

DAVID MATHEWS, et al.,)
Defendants

ORDER

The Court has reviewed the pleadings in this case and the transcript of the administrative hearings before a faculty review committee. The Court is of the opinion as set forth in the Memorandum Opinion filed contemporaneously herewith that plaintiff was denied procedural due process in the dismissal proceedings by the University.

Accordingly, it is ORDERED and ADJUDGED that the responsible officials at the University grant to plaintiff a hearing on the issue of his employment by the University which complies with the fundamental standards of procedural and substantive due process.

Done this 1st day of February, 1974.

/s/ Frank H. McFadden
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)

- v -) CIVIL ACTION NO.73-M-138

DAVID MATHEWS, et al.)

ORDER

This cause came on to be heard before a regularly scheduled motion docket upon five motions filed by the plaintiff: (1) plaintiff's motion to reconsider the Court's order dismissing the complaint against defendants Mann, Bealle, Skidmore, the Board of Trustees, Sands, Hagood, Pancake, and Johnson; (2) plaintiff's motion for preliminary injunction; (3) plaintiff's motion for partial summary judgment [including a declaratory judgment on the constitutionality of the University's termination policy]; (4) plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a hearing; and (5) plaintiff's motion to expedite action on motions (1) through (4) above.

The Court has considered the motions and has heard argument of counsel and is of the opinion that the following disposition of the motions should be made:

(1) Plaintiff's motion to reconsider the previous order dismissing certain defendants is due to be denied.

(2) Plaintiff's motion for a preliminary injunction is due to be granted to the extent that the University should pay the

plaintiff back pay at the rate of $14,300 per annum from the date that his pay was terminated until the University makes a final determination of his status. All other aspects of the motion for preliminary injunction are due to be denied.

(3) Plaintiff's motion for partial summary judgment is due to be denied.

(4) Plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a further hearing is due to be denied.

(5) The Court's disposition of motions (1) through (4) above render plaintiff's motion to expedite action on those motions moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED as follows:

(1) Plaintiff's motion to reconsider the Court's previous order dismissing defendants Mann, Bealle, Skidmore, the Board of Trustees, Sands, Hagood, Pancake and Johnson is hereby denied.

(2) Plaintiff's motion for a preliminary injunction is granted to the extent that David Mathews, as President of the University of Alabama, is hereby directed to pay to the plaintiff his regular salary (at the rate of $14,300 per annum) from the date of the plaintiff's last payment until a final determination of his status is made by the University. Payment of the back salary shall be made by June 27, 1974. All other aspects of the plaintiff's motion for preliminary injunction are hereby denied.

(3) Plaintiff's motion for partial summary judgment is hereby denied.

(4) Plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a further hearing is hereby denied.

(5) In the light of the disposition of motions (1) through (4) above, plaintiff's motion to expedite action on those motions is hereby declared moot.

Done this 20th day of June, 1974.

/s/ Frank H. McFadden
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING, Plaintiff	)
- v -	) CIVIL ACTION NO.
CHARLEY SCOTT, individually and as Assistant Academic Vice President, University of Alabama; et al., Defendants	) 75-M-0098-W

ORDER

This cause came on to be heard on plaintiff's application for a temporary restraining order. By consent of the parties, this application will be treated as a motion for a preliminary injunction. The Court has heard the oral argument of the parties and has considered the pleadings filed in the case and is of the opinion that the motion is due to be overruled.

The issue presented in this case is the constitutionality of the termination policy of the University of Alabama that covers tenured personnel. Plaintiff alleges that the policy is unconstitutional on its face

and as applied to him. The case is before the Court on plaintiff's motion for a preliminary injunction forbidding defendants from proceeding against him under the allegedly unconstitutional policy.

Plaintiff may not receive the relief he seeks with this motion at the present time. The issue here is currently before the United States Court of Appeals, Fifth Circuit, in the appeal in the case of Bowling vs. Mathews, et al., C.A. No. 73-M-138-W. Under these circumstances, the Court lacks jurisdiction to act on the plaintiff's motion.

Moreover, even if the Court has jurisdiction, plaintiff is still not entitled to the relief requested herein. The defendants are acting pursuant to the Court's order entered in the case of Bowling v. Mathews, et al., C.A. No. 73-M-138-W, and the Court will not enjoin them from obeying that order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's application for a temporary restraining order, which has been treated as a motion for a preliminary injunction by consent of the parties, be, and the same hereby is, overruled.

Done this 28th day of January, 1975.

/s/ Frank H. McFadden
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
Plaintiff)
- v -)CIVIL ACTION NO.73-M-138
)
DAVID MATHEWS et al.,)
Defendants)

ORDER

This cause came on to be heard on the motion of defendant C. Dallas Sands for entry of final judgment of dismissal as to him. The Court has examined the pleadings and is of the opinion that the motion is due to be granted. This defendant was dismissed from this action by order of the Court on February 1, 1974. The Court expressly finds that there is no just reason for delay and will direct the Clerk to enter final judgment on behalf of this defendant on the order of dismissal. Rule 54(b), Fed. R. Civ. P.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion be, and the same hereby is, granted. The Clerk is directed to enter a final judgment on behalf of defendant C. Dallas Sands on the order of dismissal entered on February 1, 1974.

Done this 22nd day of May, 1975.

/s/ Frank H. McFadden
Chief Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
)
Plaintiff)
) CIVIL ACTION
- v -)
) No. 73-M-138
)
DAVID MATHEWS, et al.,)
)
Defendants)

ORDER

This cause came before the Court on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. The Court has considered the plaintiff's motion with accompanying briefs and affidavits, as well as the entire record before this Court. The Court had heretofore, on February 1, 1974, ordered that the defendants afford the plaintiff a hearing on the issue of his employment by the University which complied with the fundamental standards of procedural and substantive due process. Pending this hearing, plaintiff's compensation was reinstated. Additional proceedings were held pursuant to that order and plaintiff was dismissed by the University. The Court has carefully examined the record of these proceedings, and finds that

said proceedings were carried out in good faith and in full compliance with the procedural and substantive due process standards required by the fourteenth amendment to the United States Constitution. Since plaintiff's termination was in accordance with constitutional standards, he is entitled to no further relief under his complaint. Accordingly, it is the opinion of this Court that the plaintiff's motion for parial summary judgment should be denied and the defendants' motion for summary judgment should be granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the plaintiff's motion for partial summary judgment be and the same hereby is denied.

It is further ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be and the same hereby is granted and judgment is entered on behalf of the defendants.

Costs are taxed against the plaintiff.

Done this 18th day of August, 1976.

/s/ Frank H. McFadden
Chief Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-1309

D.C. Docket No. CA 73-138

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

DAVID MATHEWS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

Before BELL, THORNBERRY and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 14, 1975

Issued as Mandate: May 6, 1975

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1426

D. C. Docket No. CA-75-M-0098-W

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

CHARLEY SCOTT, individually and as Assistant Academic Vice President University of Alabama, ET Al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before JONES, AISNWORTH and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 75-2949 & 76-3879

D. C. Docket No. 73-138

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

DAVID MATHEWS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before JONES, AINSWORTH and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

APPENDIX K

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70120

March 13, 1979

TO ALL PARTIES LISTED BELOW:

NOS. 75-1426, 75-2949, 76-3879 - LAWRENCE E. BOWLING
v. CHARLEY SCOTT, ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Lawrence E. Bowling
Messrs. Andrew J. Thomas
J. Frederic Ingram
Mr. Jerome A. Cooper

APPENDIX L

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVLOVED

U.S. Constitution, Article I, § 9:

"... No Bill of Attainder or ex post facto Law shall be passed."

U.S. Constitution, Article I, § 10:

"No State shall ... pass any Bill of Attainder, ex post facto Law ...."

U.S. Constitution, Amendment I:

"Congress shall make no law ... abridging the freedom of speech or of the press; or the right of the people ... to petition the Government for redress of grievances."

U.S. Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise be re-examined in any court of the United States than according to the rules of the common law."

U.S. Constitution, Amendment XIV:

"... No State shall make or enforce any law which shall abridge the privileged or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983:

"Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Revised Statutes, § 1980, 42 U.S.C. § 1985(3):

"If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more person conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President ...; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or

deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Revised Statutes, § 1981, 42 U.S.C. § 1986:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented ...."

University of Alabama, Policy on Termination:

"The policy on University termination of appointment is as follows:

Prior to the statutory retirement age, the appointment of a faculty member who has tenure, or who is employed under an appointment working toward tenure, may be terminated for adequate cause. Except as hereinafter provided, such a faculty member whose appointment is terminated will be notified of termination at least one academic year in advance of the termination date. A faculty member appointed as temporary, part-time, visiting, or acting, and whose appointment has a definate and specified termination date, should consider such appointment as notice of the non-permanent nature of his position.

A faculty member found guilty of moral turpitude, gross incompetency, immorality, rank insubordination, or felony, when the

facts are not in dispute, may be dismissed upon short notice.

Any such charges against a faculty member will be considered by a committee chosen from the faculty, and may be presented before the governing board of the institution.

In cases where facts are in dispute, the faculty member is permitted to have with him an advisor of his choosing who may act as his counsel. A record of the hearing will be made and will be available to the parties concerned." Faculty Handbook, 1968, p. 38.